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No. 87-1498

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

LORAN W. ROBBINS, et al.,
Cross-Petitioners,

v.

IOWA ROAD BUILDERS COMPANY and
EASTER ENTERPRISES, INC., d/b/a ACE LINES, INC.,
Cross-Respondents.

CROSS-PETITIONERS' REPLY TO CROSS-RESPONDENT ACE LINES' OPPOSITION TO CONDITIONAL CROSS-PETITION FOR CERTIORARI TO THE COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED

May the parties to a trust agreement governing multiemployer employee benefit trust funds contractually agree to a statute of limitations to govern Trustee collection actions arising under the LMRA and ERISA in the absence of a limitations period in either statute or a generally applicable federal statute of limitations?

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STATEMENT OF THE CASE

Central States, Southeast and Southwest Areas Health and Welfare and Pension Funds ("Central States") seeks *denial* of certiorari in this case. Out of an abundance of caution, however, Central States has filed its *Conditional* Cross-Petition in order to present an alternate basis, rejected by the court below, upon which to affirm the judgment if review is granted. Therefore, the Conditional Cross-Petition seeks to present the spectrum of possibilities which should be considered by this court if it decides to consider the "most appropriate" statute of limitations for trustee collections actions under ERISA. Viewed in this light, it is not important whether the requirements of Rule 17 have been technically met. All that Central States seeks is an opportunity, *if* review is granted, to persuade this Court that the Funds' trust agreement, not the Iowa statute, *provided* the proper basis for determining a limitations period of 10 years.

In two previous decisions, this Court has enhanced the utility of the Trust Agreements as uniform enforcement mechanisms designed to promote and protect the collective interests of all of the parties to the trusts. In *Schneider Moving & Storage Co. v. Robbins,* 466 U.S. 364 (1984), the Court ruled that the Trustees could pursue their remedies against delinquent employers directly in federal court without first resolving disputed terms of collective bargaining agreements in arbitration. In *Central States, Southeast and Southwest Areas Pension Fund v. Central Transport,* 472 U.S. 559 (1985), the Court ruled that the Trustees could audit the records of an employer's complete workforce to verify the accuracy of reporting and contributions. In the present action, Central States seeks enforcement of the "choice of law" provision of the Trust Agreements which, both prior and subsequent to March 1985, requires courts to look to Illinois law in selecting the statute of limitations for collection actions arising under the LMRA and ERISA.

Seeking to persuade the Court not to grant Central States' Conditional Cross-Petition, Cross-Respondent asserts that Central States has advanced no reason under Supreme Court Rule 17

for granting the writ and that Central States seeks merely an advisory opinion. These assertions are wholly meritless. The question whether parties to a multiemployer trust may, as a matter of federal law, contractually agree to a limitations period to govern trustee delinquency actions arising under ERISA and the LMRA raises an issue of great national importance, potentially affecting every fund that is governed by a comprehensive trust agreement and hence all employers contributing to such funds. That Central States does *not* seek an advisory opinion is evidenced by the text of the Court of Appeals decision itself which rejected the "choice of law" provision in favor of the Funds' *alternative* theory.

Hence, if review is granted at all, the spectrum of possibilities presented by both Petitions should be considered, including a contractual limitations period. In reply to Cross-Respondent's opposition, however, Central States will address only the issue whether the Conditional Cross-Petition seeks an advisory opinion.

ARGUMENT

CENTRAL STATES' CROSS-PETITION DOES NOT SEEK AN ADVISORY OPINION RATHER THAN ADJUDICATION OF AN ACTUAL CASE OR CONTROVERSY

For decades prior to March 1985, the Central States Trust Agreements provided that matters of trust administration falling within the scope of the above instruments would be governed "in all respects" by Illinois law except as preempted by federal law. Since ERISA and the LMRA do not contain a statute of limitations governing trustee collection actions and since state law is not merely *not* preempted but provides the *primary source* for filling the legislative gap, the Trustees historically and consistently construed the term "in all respects" to include procedural as well as substantive matters and hence to require application of the Illinois statute of limitations. Since passage of ERISA, the Trustees' construction of the Trust Agreement has been upheld by several district courts, thereby evidencing the reasonableness of this interpretation.[1]

Nevertheless, in March 1985 the Trustees determined to clarify the "choice of law" provision to avoid perceived ambiguity and thus the need for wasteful litigation. Consistent with this Court's ruling in *Schneider*, the Trustees amended the clause to provide that all actions to enforce the terms of the Trust Agreement, including actions to collect delinquent contributions and to conduct audits, would be governed by Illinois' ten-year statute of limitations for actions on written contracts. From the Trustees'

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[1] *Central States, Southeast and Southwest Areas Pension Fund v. Elkhart Beverage Co.*, No. S-84-0304 (N.D. Ind. 1986); *Central States, Southeast and Southwest Areas Pension Fund v. J.P. Ryan*, No. 84-CV-0317-DT (E.D. Mich. 1985); *Central States, Southeast and Southwest Areas Pension Fund v. R&W Service Systems, Inc.*, No. 78-72648 (E.D. Mich. 1981). Copies of these unpublished decisions were included in an Addendum to the appeal brief. See also, *Central States, Southeast and Southwest Areas Pension Fund v. Kraftco, Inc.*, 586 F.Supp. 1061 (M.D. Tenn. 1981), *rev'd on other grounds*, 799 F.2d 1098 (6th Cir. 1986).

perspective, the two provisions differ only in form and not in substance. Hence, as Cross-Respondent concedes (Br. pp. 8-9), Central States did not and had no occasion to argue to the courts below that it was relying on the 1985 version of the Trust Agreement which should be retroactively applied.

Moreover, as Cross-Respondent well knows, Central States did not attempt to conceal or gloss over the existence of two versions of the "choice of law" provision at any stage of the present litigation. Indeed, Central States submitted the March 1985 Trustee resolution to the District Court together with an Affidavit of Ronald J. Kubalanza (now Executive Director of the Funds), in which Mr. Kubalanza authenticated the Trustee resolution and amendment while also confirming that the prior version had been historically and consistently construed as requiring application of Illinois' ten-year statute of limitations for actions on written contracts. These materials were included in the Joint Appendix filed in the Eighth Circuit (pp. 129-133, 139-144). Further, Central States' opening Brief on Appeal contained a four-page subsection addressed to the pre-1985 language, captioned: "The Trust Agreements contain a 'choice of law' provision which the Trustees have reasonably construed as encompassing an agreement to comply with the Illinois statute of limitations." (pp. 22-26). And, of course, the text of both versions of the provision appears at fn.2 of Central States' Conditional Cross-Petition.

In the courts below, Cross-Respondent did not oppose enforcement of the "choice of law" provision on the grounds that the Illinois statute of limitations could apply only through retroactive application of the amended version. Rather, Ace Lines argued, and was understood to argue, only that the *Trust Agreement* itself was "inapposite" since Central States was attempting to collect delinquent contributions under disputed terms of a *collective bargaining agreement*.

Ruling that the two-year statute of limitations applicable to actions arising under Iowa's Wage Payment Collection Law was most analogous to Trustee collection actions arising under ER-

ISA and the LMRA, the District Court agreed with Cross-Respondent that the Trust Agreement choice of law provision was "inapposite" to actions seeking to enforce a collective bargaining agreement. Although the Court of Appeals for the Eighth Circuit reversed, holding that Iowa's ten-year statute of limitations for actions on written contracts was most appropriate, the court also rejected the Trust Agreement "choice of law" provision as "inapposite" to actions arising under federal law (as distinct from actions over which a federal court had merely diversity jurisdiction).

Significantly, neither the Magistrate nor the District Court nor the Court of Appeals distinguished between the pre-1985 and post-1985 versions of the "choice of law" provision, thereby implicitly accepting the Trustees' view that the amended provision merely clarified the drafters' original intent, changing only form not substance.[2] Hence, there is no merit whatsoever for Cross-Respondent's contention that Central States is seeking an advisory opinion.

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[2]See the Eighth Circuit's subsequent decision, *Central States, Southeast and Southwest Areas Pension Fund v. King Dodge,* 835 F.2d 1238 (8th Cir. 1987), reprinted as Appendix G to Conditional Cross-Petition (30a-33a). This action arose under the pre-1985 Trust Agreement and the "choice of law" provision, in its unamended form, was quoted in the text. (31a). The Court did *not* rule that the Trust Agreement was "inapposite" either in reliance on the *Ace Lines* decision or because the Trust Agreement was not sufficiently clear; rather, it stated that "because under either Illinois law or Missouri law a ten-year statute of limitations applies, we need not decide definitively which state's statute to apply." In *Central States, Southeast and Southwest Areas Pension Fund v. Kraftco, Inc.,* 799 F.2d 1098 (6th Cir. 1986), cited by the *Ace* panel, the Sixth Circuit rejected the Trust Agreement "choice of law" provision as being inapposite to actions arising under federal law, also without distinguishing the pre-1985 and post-1985 versions. It may be noted parenthetically that the existence of those two reported decisions rebuts Cross-Respondent's assertion that there is no judicial interest in Central States' position with regard to enforcement of the Trust Agreements. (Brief, pp. 4-5).

CONCLUSION

Contractual limitations periods are well-known in the law and have been looked upon with increasing favor by this and other courts. There is particularly good reason for the trustees of multiemployer, multistate employee benefit funds to provide for a definite limitations period in the absence of a federal statute of limitations or a ruling of this Court that the law of the forum state must always apply. Enforcement of the Trust Agreements' "choice of law" provision, and hence Illinois' ten-year statute of limitations, is of utmost practical significance to the Central States Funds, enabling the Trustees to better vindicate the rights afforded them through this Court's previous rulings.

At all stages of the present litigation, Central States sought a ruling that the Trust Agreement "choice of law" provision was not only enforceable but that enforcement best promoted national pension policy by providing consistent applications of the trust provisions and by permitting a greater recapture of delinquent contributions. Neither Central States nor the courts below distinguished between the pre-1985 and post-1985 version of the provision, and there is no basis for the view that Central States seeks an advisory opinion, merely because a ruling permitting a contractual limitations period could also provide guidance to the trustees of other funds for future conduct.

For all the reasons stated above and in its Conditional Cross-Petition, review should be granted if the Court decides to grant Cross-Respondent's Petition for a Writ of Certiorari.

Respectfully submitted,

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